

The Ombudsman's final decision

Summary: Ms C complains at the planned removal and replacement of a tree under the Council's 'Streets Ahead' programme. We find the Council at fault for not giving its independent tree panel all its reasons for wanting to remove this tree and for a misleading reply to an enquiry from Ms C. We consider the faults have caused uncertainty about whether the tree needs removing. The Council has agreed to reconsider its decision as part of its new strategy towards street trees and to apologise to Ms C for misleading her.

The complaint

1. I have called the complainant 'Ms C'. Hers is one of two complaints we have received about the Council's decision to fell a tree near her home as part of its 'Streets Ahead' programme of highway works. Ms C says the Council has provided inconsistent reasons for wanting to replace the tree. It has also rejected advice given by its independent tree panel and a tree consultancy it commissioned, saying it did not need to fell the tree. Ms C also says the Council's contractors misrepresented the advice from the tree consultancy when replying to her complaint.
2. Ms C says she passes the tree when out dog-walking and its loss would reduce her enjoyment of the area.

The Ombudsman's role and powers

3. We investigate complaints about councils and certain other bodies. Where an individual, organisation or private company is providing services on behalf of a council, we can investigate complaints about the actions of these providers. (*Local Government Act 1974, section 25(7), as amended*)
4. We investigate complaints of injustice caused by 'maladministration' and 'service failure'. I have used the word 'fault' to refer to these. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)
5. We must also consider whether any fault has had an adverse impact on the person making the complaint. I refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)

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6. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

How I considered this complaint

7. Before issuing this decision statement I considered the following:
- Ms C's complaint to the Ombudsman and subsequent information she provided via a series of email exchanges. This included an engineering report prepared for her by a third party.
 - Information provided also by the other complainant in this case.
 - Information about 'Streets Ahead' in the public domain. This included Court decisions which have considered the legality of the scheme and the associated contract arrangements.
 - Further information from the Council provided in reply to written enquiries.
 - Comments made by both Ms C and the Council in response to a draft decision statement setting out my thinking about the complaint.

What I found

Background – Council policy and challenge

8. In July 2012, the Council entered a Private Finance Initiative (PFI) contract with a contractor to deliver a highway maintenance programme over the next 25 years, known as the 'Streets Ahead' programme. The 'Streets Ahead Five-Year Tree Management Strategy 2012-2017' describes how as part of this programme the Council and its contractor would review the condition of around 36,000 street trees growing on pavements and footpaths. The contractor would assess trees by inspection. The Council explains this would be first by a specialist trees officer and second by a specialist highways officer.
9. The Council and its contractor adopted an approach for assessing the condition of the trees using criteria which have become known as the 'six D's'. It would remove trees if they were dead, dying, decayed, dangerous, damaging or discriminatory. A dangerous tree being one posing a risk to the health and safety of highway users. A damaging tree being one damaging the highway or neighbouring property/land. And a 'discriminatory' tree being one that affects someone's ability to use the highway such as a wheelchair user. The Council assessed around 6,000 trees needed removal for one or a combination of these reasons. The Streets Ahead strategy says that *"the removal of street trees will only be considered as a last resort where there are no other practicable management options to ensure safety or prevent damage to surrounding structures"*.
10. The Council's strategy led to public opposition with campaign groups created and protests undertaken against individual removals. In response to these concerns the Council set up in November 2015 an Independent Tree Panel (ITP) to advise on its plans to remove individual trees. It stated at the time that it hoped to *"put people's views at the heart of our decision making"* and to *"reassure"* citizens about its decisions.
11. The ITP would offer advice to the Council in line with its terms of reference. It would consider the case for removal following a survey of residents on a street-

by-street basis. If a majority of residents on a street who responded expressed opposition to the proposed removal, then the case went to the ITP. It had five members. Its Chair was an employee of the local Citizens Advice Bureau. Its other members included a highways engineer, an arboriculturist, a health and safety expert and another lay member. The Council said it would “*conscientiously take account*” of the ITP’s advice. But made clear that it kept the final decision on whether to remove trees.

12. The ITP received information about the location of trees identified for replacement, survey responses and the primary reason for the Council identifying the need for removal and replacement. The Council would only provide further information if the ITP requested it. The ITP terms of reference said it would take account of “*all available evidence*” but the decision on what evidence it needed in each case rested with it.
13. The Council expected the ITP take account of proposed ‘solutions’ set out in the Tree Management Strategy if advising it should keep a tree. There are seven ‘engineering solutions’ listed in that including installing thinner profile kerbs, ramping or reprofiling of footway levels, using flexible paving, removing displaced kerbs leaving a gap in a channel or filling in pavement cracks. The seventh alternative listed in this part of the policy is that of undertaking exploratory excavation before deciding on removal.
14. There are also seven ‘alternative solutions’ listed. These include root pruning, root shaving, installing root barriers, excavating underneath the roots, using tree retardants, creating larger tree pits or undertaking heavy crown reduction or pollarding. There is also the alternative of doing nothing in cases where trees have habitat value.
15. The strategy then goes on to list another 10 potential solutions. These include matters such as changing line markings on the road, building out a new kerb line, rebuilding or altering footways and so on.
16. The Council says that if the ITP advised it using any of the solutions set out in paragraphs 13 or 14 then this is something its contractors could undertake under the terms of its contract. But its contract did not cover the cost of any solutions proposed under paragraph 15.
17. A judicial review brought in 2016 sought to challenge the legality of the Council’s approach to removing trees. It argued the Council had carried out insufficient consultation; had not sought planning permission for removals (including taking account of the impact on conservation areas) and had not undertaken an environmental impact survey. The review failed on all counts. The Courts held the Council had no duty to consult on entering the PFI contract. It did not need planning consent to undertake highway maintenance. It did not need to undertake an environmental impact survey. The Court held the Council’s policy was lawful and reasonable.
18. Further Court hearings have considered the Council’s actions in seeking injunctions against protestors and creating areas preventing protest to allow removal to take place. In considering those cases the Courts have consistently held to the view that Council policy and procedures referred to above are lawful.

The Ombudsman’s approach

19. We will not seek to challenge findings made by the High Court. We will not consider complaints therefore that seek to challenge the following (this list is not exhaustive):

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- The legality of the PFI contract.
 - The overarching policy objectives set out in the Streets Ahead strategy.
 - The extent of consultation around the contract or policy.
 - The procedure for appointing the ITP or its remit.
 - The extent to which the Council has considered the environmental impact of its strategy.
 - The extent to which the Council has considered the impact of planning law or local planning guidance when implementing its strategy.
20. But we will consider investigating complaints about how the Council has applied its policy in individual cases. For example, considering what information it presented the ITP where it asked it to advise on an individual case. Or, how it considered advice provided by the ITP. Or, if it has considered new evidence potentially coming to light after the ITP gave its advice. We can also consider how the Council has considered complaints about individual decisions whether answering directly to complainants or where its contractor has done so on its behalf.

The key facts in this case

21. In 2015 an assessment identified the tree at the crux of Ms C's complaint as needing removal and replacement. The tree suffered fire damage several years ago. The inspection considered the tree had a decaying cavity and a weak structural union between two stems below that. The contemporaneous notes of the 2015 tree inspection say the inspector recommended removal because of this damage to the tree. There is no record of any further highways inspection identifying any concerns the tree also damaged the pavement.
22. The Council consulted residents of the street and a majority who responded expressed opposition to the proposed removal. The case therefore went to the ITP for consideration.
23. A spreadsheet on the Council's website records decisions about individual trees on this street and others. The ITP received a copy of this. In the section headed "*primary reason for tree being identified*" (for removal) the spreadsheet says only "*fell both stems*". In other cases, the spreadsheet records the Council giving brief reasons for removal, for example if it considered a tree damaged the carriageway or pavement.
24. In June 2017, the ITP advised against removing the tree. The spreadsheet does not record its reasons or propose any alternative solutions. But an accompanying letter says the tree had "*Possibly historic fire damage. Stem bifurcates. Impact wound [...] nearly occluded. Localised deadwood in lower crown*". The term 'occlusion' refers to how damage heals.
25. The Council rejected the ITP's advice. The spreadsheet gives its reasons as follows: "*roots tracing under footway would incur severe ramp. Tree half leaning over footway. No engineering solutions proposed by ITP*". These comments originated from an independent highways consultant the Council commissioned after the ITP gave its advice (see also below).
26. In June 2017, before the Council published its spreadsheet, Ms C met with representatives of the Council's contractor on site. She says they made no mention of any concerns the tree damaged the pavement. The Council says this is because Ms C met with trees officers and not a specialist highways officer.

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27. Immediately after the meeting, Mrs C sent those employees of the contractor an email asking the contractor to confirm its intentions. Also in June 2017 the other complainants in this case made their initial complaint to the Council's contractor.
 28. Ms C followed up that email including in late July when contractors arrived on the site to put barriers around the tree. Her email asked the Council why it had not confirmed its intentions about the tree.
 29. In August 2017, Ms C received a partial response from the contractor. It said it recommended removal because of "*decay within the stem*". It also said: "*following a further inspection of the tree, carried out by an independent tree surveyor on behalf of the Council, this confirmed a decay pocket as well as a weakened union at the base of the two stems as well as damage to the highway network radiating approximately 11 metres from the tree*". The contractor sent an email in the same terms to the other complainants in this case also, although from a different officer.
 30. This quote referred to another inspection commissioned by the Council in June 2017 after the ITP gave its advice, this time by an independent tree consultancy. Ms C asked the contractor for a copy of that report. She also queried the suggestion that damage to the pavement justified removal. A few days later Ms C said she had consulted an expert who considered the tree did not suffer any structural weakness. He had recommended some crown thinning. He considered the Council could remedy any damage to the pavement through one of the engineering solutions allowed for under the Streets Ahead programme.
 31. Ms C received two further replies from the contractor at the beginning of September 2017. The first said "*it was not possible*" to delay planned street works to respond to her enquiry. The second explained the contractor intended replacing the tree "*due to damage to the highway network, radiating approximately 11 metres from the tree*". The second complainants in this case also received an email in September 2017 in similar terms, saying "*the tree has not been recommended for replacement due to its condition [but ...] due to damage to the highway network*".
 32. Ms C escalated her concerns as a complaint. A manager for the contractor replied at 'Stage 2' of that procedure. By this time, following a Freedom of Information request, Ms C had received a copy of the independent tree consultancy report referred to in the contractor's email in August. Ms C said the contractor had misrepresented this. The consultant had agreed with the ITP advice to keep the tree. Their report had noted damage to the tree. But it said the wound margins had "*good occlusion*" and a "*strong union*" between its two stems. It had noted "*minor damage*" to the pavement, but not recommended any replacement on that basis.
 33. In its response, the contractor said it was sorry if Ms C felt it had misled her. It said the reasons for felling had not changed, but it had more than one reason for felling the tree. It did not support a suggestion of reducing the tree saying it would only grow more vigorously after that. It suggested this would weaken the tree.
 34. In November 2017 Ms C escalated her complaint further and this time the Council replied. She sent the Council a detailed chronology of the events I have summarised above. In its response, the Council accepted the damage to the tree might not justify felling but described the pavement damage as "*more problematic*". It said that only by replacement would the pavement not suffer more damage.
 35. I note that in January 2018 the other complainant who has raised with us this tree received a reply from the Council's contractor. This too said the Council had two

reasons for removing it – both the damage to the tree and the highway. It said the “ITP missed the damage to the highway” when inspecting it.

36. In support of her complaint Ms C has sent me a detailed written opinion from a retired civil engineer with around 40 years experience of highways engineering working for utilities companies and cable providers. His detailed report said the cracks to the pavement appeared “minor” and did not pose a hazard to users. Exploration of the cracks did not suggest roots close to the surface. He suggested a modern tarmac pavement, more flexible than the original, could “accommodate future root growth without cracking”. He also noted the age of the tree meant it would probably not grow extensively in the future. He considered removal unnecessary.
37. In its comments on the complaint the Council clarified that its response to the ITP advice followed it taking advice from an external consultant highways engineer. It has not provided a copy of any report they produced. But it says the comments made on the spreadsheet and quoted at paragraph 25 came from this source.
38. Both the Council and Ms C (through the report set out above) have provided me with photographs of the tree and pavement. So, has the other complainant in this case.
39. During this investigation, the Council agreed to keep on hold the removal of the tree at the crux of Ms C’s complaint.
40. Also, during investigation, the Council entered mediation talks with a group campaigning against the extent of tree removal under the Streets Ahead strategy. That has now resulted in it adopting a new strategy for street trees in the city. It only proposes removing healthy street trees “if no other practical solution can be found”. Its contractor has agreed to fund various further works to help retain trees, not included as part of the original contract.
41. The Council has agreed with the campaign group a programme of joint inspection of many trees, previously identified for removal and replacement. This will include the tree at the crux of this complaint. It has suggested in this case retaining the tree, subject to inspections focusing on its safety. I have clarified this includes consideration both of its structural safety and any damage to the highway.
42. The Council’s contractor will undertake these future inspections. In all cases it will invite the campaign group and they can attend with experts. The Council also says it will write to residents living closest to any trees affected to advise of the inspections. It hopes shortly to have on its website an updated spreadsheet which will identify inspections for the week following and the results of those already undertaken.

My findings

43. As I have explained above my role is not to question any judgment expressed by professionally qualified Council officers (or their contractors) simply because a complainant disagrees with their position. I can only uphold a complaint resulting in a decision the complainant disagrees with, if I find fault in how the Council reached it.
44. The Council’s records show that one of its tree surveyors (or that employed by its contractor) considered the damage to the tree meant the Council should replace it. This became its primary reason for removal.
45. Properly the Council then consulted residents and following their responses, referred the case to the ITP. I am satisfied the ITP received the case on the

understanding the Council wanted to remove and replace the tree because of its damaged condition. There is nothing to suggest the ITP knew of any concerns the tree also damaged the pavement. I do not doubt a highways inspection also took place before the ITP received a referral, but there is no evidence to show any such inspection identified concerns the tree also damaged the pavement. So there is no evidence that at the time of the referral to the ITP, the Council or its contractor had such concerns.

46. I consider the Council was at fault for not also making the ITP aware if it had concerns about pavement damage. I accept the Council's spreadsheet gave it only limited room to make the ITP aware of its concerns about an individual tree. I also accept the ITP could ask for more evidence if it wanted. But I consider if the Council considered damage to the pavement justified removal *as well as* the condition of the tree (as it later went on to state) then the ITP should have known this too. This is so the ITP could consider both concerns in its advice.
47. I note here Ms C queries whether the highway concerns justify removal in this case. I can understand why. First, because of the lack of historical record suggesting officers had any concerns for pavement damage. This includes her experience when she met contractors on site in June 2017.
48. Second, because there is evidence to support the contention that any pavement damage does not justify removal. I note here the tree consultancy report commissioned by the Council after the ITP gave its advice. That referred to any pavement damage as 'minor'. Then there is the detailed report provided by an engineer on behalf of Ms C. He described it in the same terms. I think it a fair description having seen multiple photographs provided by both parties.
49. This does not mean I dismiss the professional opinion the Council has also sought from an external highways engineer. But there is no evidence of how they reached their conclusion. For example, there are no reasons or calculations put forward in support of the view that a "*severe ramp*" must be created in the pavement to accommodate the tree. The available evidence suggests tree roots may lie some distance beneath the cracks (the engineer's report provided by Ms C suggests the cracking may even have different causes). While the independent arboriculture report also notes the tree is between two thirds and fully grown. So, I am simply not clear why that would be the case.
50. I therefore consider this a case where the evidence justifying removal as the 'last resort' open to the Council was far from convincing. I consider it would have been reasonable for the Council to have referred this case to its ITP a second time, to focus on the pavement damage rather than the condition of the tree. This is given the emphasis the Council put on that matter only after the ITP gave its advice.
51. This complaint also highlights a concern about what information the Council put in the public domain after receiving the ITP advice. It promised to do so "conscientiously". This suggests to me doing so with a degree of thoroughness and objectivity. It also seems clear from the statements in November 2015 when the Council introduced the ITP, that it did so to reassure citizens it acted in good faith when carrying out its Streets Ahead strategy.
52. The Council was thorough in this case, commissioning a further two experts with arboriculture and highways expertise to look again at the case for removal. But the Council has undermined this good practice by not putting in the public domain that it had taken advice from third parties and not detailing more of that advice in its public responses.

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53. I must also be critical of how it responded to Ms C's complaint. I find the email its contractor sent to Ms C in August 2017 misrepresented the expert advice it received from the tree consultancy. No-one reading that email could read it any other way than the third-party opinion supported the Council and its contractor in their decision the tree needed replacement. Not that the opposite applied. The fact another email was sent in the same terms to a different complainant, by a different officer, means I do not think this was just poor drafting. The contractor deliberately set out not to reveal the true advice it had received. This must lead me to make a further finding of fault against the Council.
54. I find it disappointing the Council and its contractor failed to recognise this when Ms C pursued her complaint. This, along with the lack of evidence showing that it always believed the pavement condition justified removal of the tree, has undermined trust in the effectiveness of its complaint procedures.
55. In considering the injustice caused to Ms C, I cannot say if the Council had not taken decisions with fault it would have decided not to remove the tree. But I consider there is a realistic basis for thinking it might have. Because the ITP did not know of any concerns the tree damaged the pavement we cannot know for certain if the panel would have shared those or thought these could be overcome. But I think on balance the latter more likely given what I have found above. In which case, the Council would have had to consider its advice and may have accepted it. All I can say for sure is that there is uncertainty. Which we regard as a form of injustice.
56. An additional injustice is also caused to Ms C through the contractor's misleading reply to her enquiry. That of avoidable distress.
57. The Council accepts these findings, while asking me to note that it was under exceptional pressure during the events covered by the complaint, resulting from the public reaction to its streets ahead programme. This is something I recognise.
58. I welcome the Council's willingness to agree a remedy for this complaint. Also, for it providing me with details of its 'new approach' to street trees which I consider provides the basis for a satisfactory outcome to this complaint, detailed below.

Agreed action

59. To remedy the injustice caused to Ms C the Council has agreed that within 20 working days of a decision on this complaint it will provide a written apology to Ms C accepting the findings of this investigation.
60. The Council will also proceed to inspect the tree further in line with its new approach to street trees, having signalled a willingness to retain this tree if possible. I am satisfied any further inspection will allow for some independent scrutiny of any concerns the Council or contractor still has about the tree's safety or pavement damage. It has agreed to write to Ms C giving advanced notice of the inspection as well as publicising that on its website. Ms C will be able to make further complaint to the Ombudsman if she is dissatisfied with any future decisions taken about this tree in the future.

Final decision

61. For the reasons set out above I have completed my investigation making a finding of fault against the Council causing an injustice to the complainant. This is on the understanding the Council will now provide a remedy to the complaint in the timescale agreed.

Investigator's decision on behalf of the Ombudsman